SANTA FE ENERGY CO.

IBLA 87-23, 87-24, 87-25 Decided January 10, 1989

Appeals from determinations of the Director, Minerals Management Service, disallowing credit adjustments on royalty remittances and assessing late payment charges. MMS-84-0071-OCS, MMS-85-0029-OCS, MMS-85-0032-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

A person claiming a refund of excess royalty payments must file a request within 2 years of the date payments were made. A refund claimant may not circumvent the refund procedures prescribed by Congress in sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1339 (1982), by "offsetting" prior alleged overpayments against future payment obligations.

2. Oil and Gas Leases: Royalties--Payments: Generally

30 CFR 218.54 authorizes the Minerals Management Service to assess late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of funds due but not paid.

APPEARANCES: Joyce Colson, Esq., Houston, Texas, for appellant, Santa Fe Energy Co.; Peter J. Schaumberg, Esq., and Christina K. Navarro, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Santa Fe Energy Company (SFE) appeals from a June 27, 1986, decision by the Director, Minerals Management Service (MMS), upholding orders of the Royalty Management Program (RMP) directing SFE to pay late payment charges and to repay unauthorized credit adjustments. 1/

1/ Appellant filed three separate notices of appeal and statements of reasons from the Director's decision, resulting in three separate docket numbers. We have consolidated the appeals for our decision.

On September 10, 1984, the Manager, Tulsa Regional Compliance Office, MMS, issued an order directing SFE to pay late charges of $57,851.37 on royalty underpayments totalling $100,023.04 on two leases: AID No. 054-003587 (South Pelto Block 8) and 054-003171 (South Pelto Block 13). According to the order, royalties on each lease were underpaid in the months April, May, July, August, October through December 1979, and January 1980.

On October 19, 1984, the Tulsa Regional Manager issued two further orders - one for each of the above leases -- requiring SFE to make resti- tution of a total of $141,014.38 for unauthorized credit adjustments taken by SFE on its royalty remittances for these leases. The order directed to lease 054-003587 (South Pelto Block 8) asserted that on its May 1983 remittance SFE had taken an unauthorized credit of $19,828.14 for the sales months of February, March, and May 1980. The order directed to lease 054-003171 (South Pelto Block 13) asserted that on its May 1983 remittance SFE had taken a credit of $121,186.24 for the sales months of February and March 1980 and May 1980 through December 1982. The orders stated that the "adjustments" were not included in written requests for refunds, but were "applied against and reduced the royalty payment[s] made." The Regional Manager ruled that SFE's credits constituted refunds not authorized by section 10(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. | 1339(a) (1982), ordered SFE to make restitution of $141,014.38 for unauthorized reductions in royalty payments, and advised that appropriate late payment charges would be computed and billed upon receipt of additional royalties. 2/

In its appeals to this Board, SFE concedes that underpayments of $61,907.66 and $38,055.38 were made on South Pelto Block 8 and South Pelto Block 13, respectively, during the period April 1979 through January 1980. SFE asserts, however, that from February 1980 through December 1982 it overpaid royalties by $19,828.14 on South Pelto Block 8 and $121,186.24 on South Pelto Block 13. SFE asserts that it corrected these overpayments by taking credits on its May 1983 MMS Form 2014 (Report of Sales and Royalty Remittance). On that form "SFE offset the total overpayments [$141,014.38] on South Pelto 8 and 13 against the total underpayments on those leases [$100,023.04] resulting in a net overpayment of $40,991.34." 3/

As noted earlier, MMS' October 19, 1984, orders held that SFE's credit adjustments amounted to improper recoupment not authorized under section 10 of OCSLA. Addressing those rulings, SFE contends that section 10 of OCSLA is inapplicable because the credits taken by SFE were matched by increased payments by its co-lessees. Essentially, SFE suggests that the credits taken on its May 1983 MMS Form 2014 were a permissible alternative to a section 10 refund. SFE contends that the MMS Payor Handbook authorizes such adjustments on Form 2014 where required by pricing changes.

2/ Late charges for these credit adjustments have not yet been assessed and should not be confused with the late charges which were the subject of the Regional Manager's Sept. 10, 1984, order. See MMS Answer at note 1.

3/ Statement of Reasons, IBLA 87-23 at 2.

SFE offers the following arguments as to why no late payment charges are due. 4/ It contends that in assessing late payment charges for the underpayments of $61,967.66 and $38,055.38, MMS erroneously ignored overpayments of $19,828.14 and $121,186.24 on the two leases. SFE contends that underpayments and overpayments should be offset on a cross-lease basis.
As a result of such an offset, there would be no underpayment on which late payment charges could be assessed. Alternatively, SFE contends that no late payment charges should be assessed because the under- and overpayments should be considered as estimated royalty payments. SFE suggests further that no late payment charges should be assessed because (under its theory of offsetting) royalties have been paid in full and further payments would unjustly enrich MMS.

The issues in these appeals are stated in MMS' Answer: Whether SFE's unauthorized reductions in royalty payments to correct prior overpayments are subject to the statutory refund process under section 10 of OCSLA and, if so, whether MMS had the authority to assess late payment charges for royalty underpayments without regard to overpayments made under the same leases.

Section 10(a) of OCSLA provides that where it appears to the Secretary of the Interior that any person has paid in excess of what he was lawfully required to pay, "such excess shall be repaid * * * if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment."

MMS asserts that section 10 of OCSLA applies to refunds and credits claimed by "any person" and that to the extent SFE discharged part of its co-lessees' royalty obligations it should have sought contribution from its co-lessees rather than taking unauthorized credits.

MMS points out that offsetting all underpayments against all over- payments (credit adjustments) on each lease would have resulted in a net underpayment of $42,139.52 on South Pelto Block 8 and a net overpayment of $83,130.52 on South Pelto Block 13. MMS argues that the results reached by SFE, by means of cross-lease offsetting, are neither permitted nor supported by precedent. MMS states that its accounting system is designed to account for an individual payor on an individual lease. Its rationale against cross lease offsetting is as follows:

> [I]f the MMS were required to offset all over and underpayments held by a lessee, regardless of the lease from which they arose, a lessee could circumvent section 10. For example, if a lessee found that it had failed to timely request a refund, the lessee could wait indefinitely until the MMS uncovered an underpayment in the course of an audit of another lease. Then the lessee

4/ The actual late payment charge, $57,831.57, is not challenged by SFE, and is not before us in these appeals.

> would merely have to notify the MMS of the otherwise barred overpayment to receive credit. In addition, the MMS would lose control of its audit power because it would have to review all of the lessee's payments on all of its leases each time a refund request was made to ensure that a net overpayment existed. In the more extreme case, a lessee, after discovering a time barred overpayment could intentionally underpay on its current royalty bill and then, when MMS ordered payment, the lessee would simply resurrect the time- barred overpayment. The single lease offset theory prevents this type of circumvention of section 10.

(MMS Answer at 9).

MMS contends that crediting is subject to section 10 of OCSLA which clearly mandates that "[n]o refund of or credit for such excess payment shall be made until after * * * a report * * * is submitted to the President of the Senate and the Speaker of the House of Representatives." 43 U.S.C. | 1339(b) (1982). Thus, MMS concludes that SFE's net credit adjustment of $40,991.34 was unlawful.

Referring to the late payment charges imposed by its September 10, 1984, order, MMS asserts that royalty payments between April 1979 and January 1980 were not timely or properly made, as required by 30 CFR 218.150(b). Therefore, late payment charges were properly assessed on SFE's underpayments of $61,967.66 and $38,055.38 (South Pelto Block 8 and South Pelto Block 13, respectively) without regard to SFE's overpayments on the same leases during the period February 1980 through December 1982. MMS states that SFE's credits cannot be considered as estimated royalties not subject to late charges under 30 CFR 218.150(b).

[1] As to the first issue, there can be no doubt that the credits taken by SFE on its May 1983 MMS Form 2014 were subject to section 10 of OCSLA. In Mobil Oil Co., 65 IBLA 295, 304 (1982), the appellant argued that overpayment of royalties should be treated as payment of future royalties. The Board rejected this argument: "With respect to refunds, repayments or credits, the 2-year period in the statute applies * * *. The purpose of the 2-year limit is to urge lessees to verify their accounts promptly and ascertain the correctness of payments within the time provided." 65 IBLA at 304 (emphasis supplied).

In Mobil Oil, supra, the Board clarified the proper use of the term "offsetting." Agreeing with Solicitor's Opinion, M-36942, Refunds and Credits under the Outer Continental Shelf Lands Act, 88 I.D. 1090 (1981), the Board observed that offsetting is the crediting of overpayments against past payments due and that "offsetting has nothing to do with refunds and is permissible within the auditing period, whether or not that period is within 2 years of the date of the audit." 5/ OCSLA's reference to crediting, as in section 10(b) ("refund of or credit for such excess payment") refers, on the

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5/ Mobil Oil Co., supra, involved an audit by the Department in which under- and overpayments of royalties were discovered.

other hand, to credits "against future payments due and is governed by the 2-year limitation in the statute just as refunds and repayments are." 65 IBLA at 303.

In Kerr-McGee Corp., 103 IBLA 338 (1988), the appellant filed a belated request in January 1978 for reimbursement of royalty payments made between 1961 and 1970. In February 1978, the appellant deducted the amount for which it had requested reimbursement from its monthly report of sales and royalty filed with the Geological Survey. Affirming MMS' decision that appellant's "offset" was improper, the Board stated:

> If this procedure were countenanced, we would thwart the will of Congress, which has expressly provided how refunds for overpayments are to be processed. The Secretary of the Interior, not the individual claimant, is empowered to pass judgment on refund requests and only requests which are timely filed are entitled to be approved.

103 IBLA at 340. Under section 10 of OCSLA, a person claiming a refund of excess royalty payments must file a request within 2 years of the date the payments were made. Had SFE filed a refund request in May 1983, its request would have been barred as to South Pelto Block 8 because the relevant payments occurred more than two years earlier. As to South Pelto Block 13, the request would have been barred as to payments occurring prior to June 1981. SFE's attempt to obtain credits for prior overpayments through an offsetting procedure which circumvents section 10 of OCSLA cannot be endorsed by this Board. Kerr-McGee, supra.

SFE's alternative arguments are not viable. As MMS points out, the MMS Payor Handbook cannot furnish a lessee authority to violate OCSLA. According to MMS, "current" passages of the Handbook provide that overpayments on an OCS lease cannot be recouped without prior MMS approval. MMS' Handbook, even assuming its applicability to SFE's actions, clearly lacks the force and effect of law. Chevron U.S.A., Inc., 105 IBLA 21, 26 n.5 (1988); Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986).

[2] The second issue concerns MMS' authority to assess late payment charges or interest on royalty underpayments on both leases between April 1979 and January 1980. The Department's authority to assess such charges is well established. Royalty payments for oil and gas produced from a Federal lease are "due at the end of the month following the month during which the oil and gas is produced or sold." 30 CFR 218.50(a). The regulation dealing with late payment charges, 30 CFR 218.150(b), states that "[t]he failure to make timely or proper payments of any monies due pursuant to leases * * * subject to these regulations will result in the collection of the amount past due plus a late payment charge." As noted earlier, under SFE's offsetting procedure, there were no underpayments which could be subject to assessment of late payment charges. SFE's accounting ignores the time con-straints of 30 CFR 218.50(a) and the equitable right of the United States to be compensated for the loss of use of funds due it under the royalty program. Sonat Exploration Co., 105 IBLA 97, 120 (1988), and cases cited. Under SFE's theory of offsetting, the Government's authority to collect

interest for underpayments or belated payments would be subject to the whim of lessees verifying their accounts and establishing a "royalty payment in full" by balancing underpayments against overpayments without regard to lease accounts or time elapsed. Such results were not intended by Congress and are contrary to governing regulations and applicable precedent. See Cities Service Oil & Gas Corp., 104 IBLA 291 (1988); Sun Exploration & Production Co., 104 IBLA 178 (1988).

SFE's argument that prior under and overpayments should be regarded as estimated payments is without merit. As MMS points out, the estimated royalty exception (to assessment of late charges) of 30 CFR 218.150(b) refers to situations where "estimated payments * * * have already been made timely and otherwise in accordance with instructions provided by MMS to the payor." Explaining its policies, MMS states that a lessee may make an estimated royalty payment for January production in February, whereupon, the lessee will have until the end of March to make the actual payment. When the payment is made in March, however, MMS asserts the estimated royalty payment rolls forward 1 month, thereby constituting the estimated payment for February production. If it is subsequently determined that the lessee owes additional royalties for January production, MMS states that the estimated payment is no longer available to cover that late payment, and interest charges are properly assessed (MMS Answer at 17). See also Yates Petroleum Corp., 104 IBLA 173 (1988). The facts in these cases are vastly different from the circumstances intended to be covered by MMS' estimated payment procedures.

Citing 30 CFR 290.4, SFE requests oral argument. This regulation refers to oral argument before the Director, MMS. In a case pending before the Office of Hearings and Appeals, oral argument may be granted at the discretion of the Director or an Appeals Board. 43 CFR 4.25. We have decided these appeals on the basis of clearly applicable statutory and regulatory authority and well-established precedent. Oral argument is unnecessary and the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge